SUPREME COURT, U. S.

DEC 29 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 826

THOMAS KNIGHT, et al.,

Appellants,

against

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM BY APPELLANTS, BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK AND JAMES E. ALLEN, AS COMMISSIONER OF EDUCATION

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Appellees, the Board of Regents of the University of the State of New York and James E. Allen, as Commissioner of Education, move pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, that the judgment of the United States District Court for the Southern District of New York be affirmed or, in the alternative, that this appeal be dismissed.

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Opinions Below

The endorsement memorandum of the Hon. Sylvester J. Ryan, District Judge, granting plaintiffs' motion to convene a three-judge District Court is not reported. The opinion of the District Court for the Southern District of New York is reported at 269 F. Supp. 339. Copies of the endorsement memorandum and of the opinion are reproduced as Appendix "A" to appellants' jurisdictional statement.

Jurisdiction

Appellants invoke the jurisdiction of this Court under 28 U.S.C. Section 1253.

Statutes Involved

New York State Education Law § 3002 and New York Revised Penal Law §§ 210.00 and 210.05 (Appellants' Appendix "B").

Question Presented

Does the question of the constitutionality of the statute requiring citizens who teach in public and publicly supported educational institutions in New York to make an affirmation of support for the State and Federal Constitutions and of faithful performance as a teacher raise a substantial federal question requiring a full hearing before this Court?

Statement

Section 3002 of the New York Education Law declares that it is unlawful for any United States citizen to serve as a teacher in the public school system of the State, or

in any private educational institution whose real property is exempt from taxation, unless he shall take an oath in which he swears simply to perform his duties as a teacher faithfully, and to support the Constitutions of the United States and the State of New York. The statute also declares that it is unlawful for any school official having control over the employment of teachers to permit a person to serve in violation of the statute. The statute does not, however, prescribe any penalty for a violation thereof, nor does any other statute explicitly operate to provide a penalty for violation of Section 3002. Appellants claim in this Court that they may possibly be liable for prosecution for "perjury in the third degree" (a misdemeanor), under New York Revised Penal Law §§ 210.00 and 210.05, if they take the oath.

Although Education Law § 3002 was enacted in 1934, Adelphi University, a private institution of higher learning whose real property is tax exempt, had not required its faculty members to take the oath, through inadvertence. In October 1966, at the request of the Board of Regents of the University of The State of New York and the State Commissioner of Education, James E. Allen, Adelphi University requested that the members of its faculty execute the oath.

The appellants are members of the faculty of Adelphi University. When they were requested to take the oath, they refused and commenced this action against the appellees in the United States District Court for the Southern District of New York on November 29, 1966. In the complaint appellants sought to declare Section 3002 unconstitutional and to enjoin its enforcement. At the same time, appellants moved for the convening of a three-judge District Court and for a temporary restraining order enjoining the appellees from enforcing the provisions of Section 3002 pending the futher order of the Court. The appellees moved to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief could be

granted. By memorandum endorsement dated April 4, 1967, the District Judge denied appellees' motion and granted appellants' motion to convene a three-judge Statutory Court.

A hearing before the three-judge Court was held on May 2, 1967. By decision dated June 2, 1967, the District Court held that Education Law § 3002 did not violate appellants' constitutional rights and was not unconstitutional. Accordingly, the Court denied the motion for an injunction pendente lite and granted appellees' motion to dismiss the complaint. Notice of appeal was filed on July 19, 1967. By order of the District Court dated July 27, 1967, enforcement of Education Law § 3002 against the appellants was stayed pending the determination of this appeal.

No Substantial Federal Question Is Presented Requiring Full Hearing Before This Court

I. The challenged oath of office required by New York State is a valid exercise of its power to regulate and supervise education. Such oaths have been implicitly upheld by this Court.

The challenged oath (or affirmation), identical to the oath of office prescribed for certain state and federal officials, merely requires affirmation of support for the United States and New York Constitutions (U. S. Const. Art. II, § 1, Art. VI; N. Y. Const. Art. 13, § 1). This Court has made clear that a narrowly drawn oath is constitutionally permissible as a condition of holding office or obtaining governmental privileges. As was held in *American Communications Association* v. *Douds*, 339 U. S. 382, 414:

> "It is obvious that not all oaths were abolished; the mere fact that § 9(h) is in oath form hardly rises to the stature of a constitutional objection . . ."

This ruling was recently affirmed in *Bond* v. *Floyd*, 385 U. S. 116, 132, where this Court noted its agreement with

the constitutional oath of office required by the State of Georgia:

> "Thus we do not quarrel with the State's contention that the oath provisions of the United States and Georgia constitutions do not violate the First Amendment."

The sole question presented by appellants' Jurisdictional Statement is whether this particular oath violates constitutional strictures either because of the affirmation required or because of its application to plaintiffs. We submit that the recent holdings by this Court in such cases have implicitly rejected this challenge.

Appellants erroneously characterize the provision in question as a loyalty oath. This is without merit. We are dealing here with an affirmation of support for the Federal and State Constitutions and clearly not a loyalty oath directed against subversive activities or membership in groups sponsoring such activities. It is significant that appellants ignore the second portion of the oath in which affiant promises to perform his duties as a teacher faithfully. This second portion demonstrates that the entire provision is indeed an oath of office.

Objection to the content of the oath is based in part on the argument that it would require orthodoxy of thought and constitute an invasion of privacy in violation of the First, Ninth and Fourteenth Amendments of the United States Constitution. It is suggested, for example, that, by reason of such oath, teachers objecting to United States foreign policy might not be hired by school administrators (Jurisdictional Statement p. 8). This is a speculation for which no factual basis is presented. The fallacy in this argument is inherent in the very case which appellants have chosen to illustrate it. In *Bond* v. *Floyd*, *supra*, this Court in explicit terms differentiates support for the Con-

stitution from agreement with particular aspects of national policy:

> "... while the State has an interest in requiring its legislators to swear to a belief in constitutional processes of government, surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy. The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." (385 U. S. at p. 135)

Thus, the constitutional oath of office does not suppress the right of legislators to express political views, inquire into and criticize state or national policy, nor would it suppress similar freedom on the part of teachers and academicians to do so. The District Court in its opinion, likewise, found the statute "to impose no restrictions upon political or philosophical expressions by teachers in the State of New York" (App. p. 32). The record of activities of teachers in the outstanding colleges and universities in New York shows the lack of any substance to the assertions of appellants. New York teachers in such institutions would be astounded to learn that they are restricted in their expressions simply by the statutory oath to which they have all subscribed.

The case of *West Virginia State Board of Education* v. *Barnett*, 319 U. S. 624, is inapposite since it involved compliance with a ritual salute and pledge of allegiance to the flag which interfered with the religious freedom of Jehovah's Witnesses (who abhor "graven images"). This Court held that West Virginia could not require the ritual of all school children at the beginning of each school day, but must excuse those who objected to such a surrender of their religious freedom.

The fear of penal sanction for mental reservation when taking the oath is simply an exercise in imagination. It is unreal and would not justify the invocation of any penal sanction or even any far-fetched possibility of such risk. In accordance with the general rule that violation of a promise of future conduct will not support a prosecution for perjury, alleged violation of official oaths would not constitute perjury. *State* v. *McCarthy*, 255 Wis. 234, 38 N. W. 2d 679. (See also 70 C.J.S. pp. 462-463.) In the District Court appellants sought to conjure up other penal sanctions. The District Court found there was no merit to such contentions (App. p. 30) and their argument in the District Court has not been renewed. Instead the fictitious risk of perjury has been rolled out for this Court. This, too, has no factual or legal merit.

Appellants further urge that the "right to be left alone" is paramount over the state requirements here in question. It should be noted that unlike the *Barnett* case, where school children were required under compulsion to attend school and to engage in the ritual salute, appellants are voluntarily seeking to teach in public or publicly supported schools. The rationale of *Hamilton* v. *Regents*, 293 U. S. 245, is pertinent here. There, this Court held that as to students voluntarily enrolling in a state college, there was no right to be excused from required military training courses. Those who take advantage of opportunities and privileges offered by the State may not, on the grounds of conscience, refuse compliance with reasonable conditions imposed upon them. Since the government had the power to impose the draft itself upon men of military age, it had a corollary power to prescribe military training.

There can be no question that education is equally a matter of vital state concern and that educational institutions and their faculties are subject to reasonable state regulation under the police power. *Institute of Metropolis, Inc.* v. *University of the State of New York*, 159 Misc. 529 (Sup. Ct. Albany Co. 1936), *aff'd* 249 App. Div. 33 (3rd

Dept. 1936), *aff'd* 274 N. Y. 504 (1937). See also *Adler* v. *Board of Education of City of New York*, 342 U. S. 485, 493 (1952); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 602; *Shelton* v. *Tucker*, 364 U. S. 475, 485, 495-496.

Section 3002 of the Education Law applies solely to teachers employed in the public school system of the State and those on the faculty of "any school, college, university or other educational institution in this state, whose real property in whole or in part, is exempt from taxation . . .". Certainly the State may impose reasonable conditions for employment on the faculties of private institutions enjoying tax exemption, including the taking of an oath which is merely a "minimal" affirmation of support for the Constitution. *Cf. Speiser* v. *Randall*, 357 U. S. 513; *Meyer* v. *Nebraska*, 262 U. S. 390, 402.

II. The provision in question is not unconstitutionally vague in violation of the First Amendment of the United States Constitution.

The oath of office simply requires adherence to a constitutional standard of conduct. Since it is identical to the oath taken by virtually every public officer on federal, state and local levels, its language can hardly be said to be mysterious or unclear.

None of the cases cited by appellants provide any support for the argument that the oath is unconstitutionally vague. In *Baggett* v. *Bullitt*, 377 U. S. 360, this Court held that two statutes of the State of Washington were uncertain and over-broad. The 1931 statute required teachers to aver their respect for the "flag and institutions" of the United States and the State of Washington and their "undivided allegiance to the government of the United States". The 1955 oath applicable to all state employees provided that no "subversive person" shall be eligible for public employment. These statutes were found to have left a wave of confusion in their wake. None of such doubts inhere in the

case at bar which does not impinge on free criticism of United States institutions and policies as well as advocacy of unpopular views, *Bond* v. *Floyd, supra.*

In *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, a Florida statute required all state employees to aver that they had never knowingly lent "aid, support, advice, counsel or influence to the Communist party". This language aroused the same questions as the provisions in *Baggett*. Obviously, such provisions lend themselves to the conclusion that they are unconstitutionally restrictive of conduct while the oath of office challenged here would be restrictive only of conduct impermissible under the Constitution.

Elfbrandt v. *Russell*, 384 U. S. 11, struck down an oath subjecting any state employee who knowingly became a member of the Communist party or any other organization having as its purpose the overthrow of the government of Arizona, to prosecution for perjury and discharge from employment. This Court found unduly restrictive the statute's coverage of employees who had joined but never participated in the activities of revolutionary organizations. Mr. Justice Douglas observed that the first portion of the challenged oath read in a "conventional fashion"—that is, it was identical to the usual oath to support the Federal and State Constitutions, the oath here. However, "The legislature put a gloss on the oath" by adding the loyalty provisions and references to political organizations.

It should be noted that *Baggett, Cramp* and *Elfbrandt* all included constitutional oaths of office which were not held objectionable and in each of these cases this Court based its rejection on the unclear terminology of the "anti-subversive" portions.

This distinction was also underlined by a three-judge Federal Court in *Georgia Conference of American Association of University of Professors* v. *Board of Regents*, 246 F. Supp. 553, 555 (N. D. Ga. 1965):

> "The sum of our holdings with respect to the 1935 statute and the 1949 statute as amended in 1950 is

that plaintiffs may be required to swear to uphold, support and defend the Constitution and laws of Georgia and of the United States and that they are not members of the Communist Party. They have not objected to doing so. The balance of the oaths prescribed in the statutes are void."

In *Whitehill* v. *Elkins*, —— U. S. ——, 19 L. ed. 2d 228, 36 L. Week 4006 (Nov. 7, 1967), this Court struck down a Maryland oath which appeared to proscribe abstract advocacy of violent overthrow of the government. Such abstract expression of opinion is constitutionally protected and, therefore, would not violate an oath to support the Constitution called for by the challenged statute. Indeed, this Court indicated in *Whitehill* that a more "narrowly drawn" oath would have been acceptable.

It is respectfully submitted that if any oath fits that definition, it is the oath challenged here.

III. The provision in question does not deprive appellants of the equal protection of the law.

Appellants admit (p. 14) that oaths to support the Constitution are required of the President, judges and public officers. As the District Court opinion notes, appellants conceded upon the argument that there was no tenable objection to such oaths (App. p. 32). It is urged by appellants, however, that such oaths "appear to be ceremonial in nature" and that this may somehow make them permissible as to government officials but not as to teachers in public or publicly-supported universities (Br. p. 14).

However, appellants overlook the fact that adherence to a substantially identical provision is required of many private citizens who exercise particular functions of vital concern to the State. Attorneys, for example, are required by New York Judiciary Law § 276 to take the "constitutional oath of office". Such an oath required of attorneys

has been upheld in *In re Summers*, 325 U. S. 561. It would be curious indeed if a candidate for admission to the Bar of this Court were to claim that his views as to the Constitution could be suppressed in any way pursuant to the oath he is required to take upon admission under Rule 5 of this Court. If it be argued that academic freedom requires a greater scope of inquiry and advocacy than that required by attorneys in this Court—a proposition which appears to be inherently fallacious—it should again be noted that the provision in question requires faithful performance as a teacher. Such performance must necessarily include full exercise of academic freedom and free inquiry into popular and unpopular ideas.

It is axiomatic that the equal protection clause only prohibits invidious discrimination. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489. Furthermore, the Legislature may properly legislate with respect to certain groups in a general class without having to include all in such legislation. *Gold* v. *DiCarlo*, 235 F. Supp. 817 (S.D.N.Y. 1964), *aff'd* 280 U. S. 520. Certainly, Education Law § 3002 is not an unconstitutional denial of equal protection to these plaintiffs simply because the statute does not require a constitutional oath from non-professional employees at Adelphi and other universities rather than just members of the faculty. See, too *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79; *Wilson* v. *New*, 243 U. S. 332; *Bryant* v. *Zimmerman*, 278 U. S. 63, 73-77.*

The Legislature chose to exclude non-citizen teachers from executing the oath of office. The reason for this is clear—if aliens took an oath of support for the United States and State Constitutions, they might lose their own

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* Appellants' brief refers also to "thousands of teachers at non-tax exempt educational institutions" as "exempt from the oath requirements" (Br. p. 20). We know of no support for such assertion. All nonprofit schools in New York State are considered tax exempt under New York Real Property Tax Law §§ 420 *et seq.*

citizenship. While the State has the power to prohibit aliens from professions affected with the public interest (e.g. nursing, New York State Education Law §§ 6905, 6906 and medicine, New York State Education Law § 6506), it has chosen not to exclude them from the teaching field. Having made this choice, however, it would have been anomalous to require them to forfeit their own nationality. In an analogous area, attorneys who are not citizens of the United States but who are admitted to practice in the courts of their own country, may argue before this Court in certain circumstances under Rule 6 but are not required to subscribe to the attorney's oath under Rule 5.

Nor is it unreasonable for the Legislature to have imposed requirements on teachers, pursuant to the public trust vested in them, which are not imposed upon administrators of universities whose dealings are with finances rather than the education of a new generation. *Keyishian* v. *Board of Regents of the University of the State of New York*, 385 U. S. 589.

The classification created by the Legislature in § 3002 of the Education Law do not irrationally discriminate against appellants nor indeed against any other teachers in public or tax-exempt institutions. Such classification is, therefore, free from constitutional infirmities. Appellants simply are averse to the requirement of any oath.

CONCLUSION

For the foregoing reasons, the within motion to dismiss or affirm should be granted.

Dated: New York, New York, December 27, 1967.

Respectfully submitted,

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